Case No. LWZ-0031

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion to Dismiss

Name of Petitioners: Westinghouse Hanford Company

Date of Filing: April 5, 1994

Case Number: LWZ-0031

This determination will consider a Motion to Dismiss filed by Westinghouse Hanford Company (WHC) on April 5, 1994. In its Motion, WHC seeks the dismissal of the underlying complaint and hearing request filed by Helen "Gai" Oglesbee under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. Oglesbee's request for a hearing under 708.9 was filed on February 28, 1994, and it has been assigned Office of Hearings and Appeals (OHA) Case No. LWA-0006.

I. Background

The Department of Energy's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent[ ] fraud, mismanagement, waste, and abuse" at DOE's Government-owned or -leased (GOCO) facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

Oglesbee is currently an employee of WHC, the prime contractor at the DOE's Hanford Nuclear Site. Since June 1987, Oglesbee has been employed by WHC as a Secretary Level III (June 1987 to September 1992), Secretary Level IV (September 1992 to January 1993), Temporary Upgrade Plant Engineer (January 1993 to June 1993), and Plant Engineer (June 1993 to the present).

Oglesbee alleges that she made various health and safety complaints to her immediate supervisor on a continuing basis from June 1987 to August 1991, and that beginning in October or November 1990 she raised these concerns with her supervisor's superiors. She alleges that after doing so, WHC retaliated by failing to respond to her health-related issues and denying her access to reports and analyses of those issues; removing her designation as "Lead" Secretary; denying her a promised promotion; issuing her a performance improvement plan; transferring her involuntarily to another WHC office; issuing her a performance expectations letter; and issuing her written reprimands. These

alleged actions occurred over a period from 1987 through April 1992 (issuance of second written reprimand).

On August 24, 1992, Oglesbee filed a complaint with the DOE Richland Field Office (DOE/RL) pursuant to 10 C.F.R. Part 708. On October 2, 1992, after an unsuccessful attempt was made by DOE/RL to reach an informal resolution, Oglesbee's complaint was forwarded to the DOE's Office of Contractor Employee Protection (OCEP) to institute a formal investigation. OCEP conducted an on-site investigation of Oglesbee's allegations of reprisal and issued a Report of Investigation and a Proposed Disposition on February 18, 1994. / Prior to the on-site phase of OCEP's investigation, Oglesbee alleged that WHC had threatened to extend her status as Temporary Plant Engineer, rather than promoting her to a permanent position. The Proposed Disposition, which relied upon the findings in the Report of Investigation, concluded that Oglesbee had made protected disclosures related to her health and safety concerns, but that a preponderance of the evidence did not support a finding that the disclosures were a contributing factor in any of the alleged actions taken against her. / With regard to Oglesbee's complaints that she was issued written reprimands and that her promotion to Plant Engineer was delayed, the OCEP found that these issues had already been resolved by WHC in accordance with the relief it would have recommended had it found that the actions were retaliatory. WHC removed the written reprimands from Oglesbee's personnel file and she was promoted to Plant Engineer in June 1993.

On February 28, 1994, Oglesbee submitted her request for a hearing under 10 C.F.R. 708.9 to OCEP. On March 10, 1994, OCEP transmitted that request to the OHA. On May 4, 1994, procedures and a briefing schedule were established for the hearing in this case under 708.9(b). The hearing is presently set for June 15, 16, and 17, in Richland, Washington. On April 5, 1994, WHC filed a Motion to Dismiss the proceeding, and submitted a statement in support of that Motion on May 13, 1994 (hereinafter "Statement"). The complainant filed a reply to WHC's statement on May 18, 1994 (hereinafter "Reply"). In its statement, WHC maintains that Oglesbee's August 24, 1992 complaint was not timely filed, and that the complaint was insufficient to confer jurisdiction on OCEP to investigate Oglesbee's allegations. For the reasons stated below, I find both arguments to be without merit. I will therefore deny WHC's Motion.

II. Analysis

A. Timeliness of the Complaint

The Part 708 regulations provide that a "complaint . . . must be filed within 60 days after the alleged discriminatory act occurred or within 60 days after the complainant knew, or reasonably should have known, of the alleged discriminatory act, whichever is later." 10 C.F.R. 708.6(d). WHC asserts that Oglesbee's August 24, 1992 complaint must be dismissed because it was filed more that 60 days after the discriminatory acts alleged by the complainant. Statement at 7-8.

Once a complaint has been filed, 708.8(a)(2) provides that the OCEP Director may accept the complaint, unless she determines that the complaint is untimely. While it is true that 708.6(d) states that a complaint must be filed within 60 days after the alleged discriminatory act occurred, 708.15 permits the "Secretary or designee," i.e. the appropriate DOE official depending on the stage of the proceeding, to extend "all time frames" set forth in Part 708. It is therefore clear that under these regulations, the decision to accept a complaint filed after the 60-day period in 708.6(d) is within the discretion of the OCEP Director. In the present case, the OCEP Director did not dismiss the complaint as untimely, and there is nothing in the record to suggest that she abused her discretion.

In its Statement, WHC attempts to avoid this conclusion by characterizing the 60-day time period in 708.6(d) as jurisdictional. In Sandia National Laboratories, 23 DOE 87,501 (1993) (Sandia), we considered, and ultimately rejected, the same argument. There is nothing in Part 708 that would indicate that the 60-day period was meant to be jurisdictional in nature. / WHC analogizes the Part 708 proceedings to the employee protection schemes administered by the Department of Labor, where, WHC argues, a "30-day limitations period has been strictly construed . . . ." Statement at 9. However, as pointed out by the complainant, the time limits imposed in DOL proceedings are expressly prescribed by statute. Reply at 6; see Solid Waste Disposal Act, 42 U.S.C. 6971; Safe Drinking Water Act, 42 U.S.C. 300j-9(i); Comprehensive Environmental Response, Compensation and Liability Act of 1974, 42 U.S.C. 9610; Toxic Substances Control Act, 15 U.S.C. 2622; Energy Reorganization Act, 42 U.S.C. 5851; Federal Water Pollution Control Act, 33 U.S.C. 1367; Clean Air Act, 42 U.S.C. 7622. By contrast, the more flexible time frames governing this proceeding originated in the Part 708 regulations, which were not mandated by a specific statute, but were issued pursuant to the broad authority granted the DOE to manage the GOCO facilities in its nuclear weapons complex by the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201, the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5814 and 5815, and the Department of Energy Organization Act, as amended, 42 U.S.C. 7251, 7254, 7255, and 7256. Indeed, there are a number of reasons why 708.6(d) should not be read as barring the investigation of a complaint that is filed more than 60 days after the alleged discriminatory act occurred or should reasonably have been discovered. See Sandia, 23 DOE at 89,002-03.

First, the DOE Contractor Employee Protection Program is intended to encourage contractor employees to come forward "with information that in good faith they believe evidences unsafe, unlawful, fraudulent, or wasteful practices." 57 Fed. Reg. at 7533 (March 3, 1992). Employees of DOE contractors and subcontractors should be able to disclose safety concerns without fear of reprisal, and employees who believe they have been subject to a reprisal should feel they are able to seek protection from the DOE. The regulations should be construed in a manner which furthers this primary purpose. It is clear from the regulatory history of this new program that the 60-day time limitation for the submission of complaints was never intended as an ironclad technical requirement. Id.; see also Sandia, supra.

Second, the preamble to Part 708 states that the reason for adopting a time limit for the filing of a complaint of discrimination under this new program was to ensure the investigation of complaints would not be rendered "more difficult as memories grow dimmer with the passage of time." 57 Fed. Reg. at 7537 (March 3, 1992). In the present case, after conducting an investigation, the OCEP

Director found that there was sufficient evidence on which to move forward. WHC's argument that fading memories "may have easily hampered OCEP's investigation in ways that may not be brought out until the proposed hearing" is purely speculative at this time. Statement at 10-11. At this stage in the proceeding there is no evidence that any delay in the filing of the complaint hampered the investigation.

Finally, WHC contends that it "has been prejudiced in its ability to defend itself because of Ms. Oglesbee's delay in filing the Complaint." Statement at 11. Again, any argument based on prejudice is purely conjectural at this stage of the case. I fail to see how any delay conceivably worked to the detriment of WHC, since OCEP found in favor of the company with regard to each of the complainant's allegations.

B. Sufficiency of the Complaint

In its Statement, WHC also maintains that the Complaint is insufficient because it does not meet the criteria outlined in 708.6 (c). WHC contends that there are no allegations in the Complaint that **specifically** state or identify acts of reprisal by WHC. The firm also states that OCEP does not have the authority to find alleged discriminatory acts outside of the Complaint and cannot create a sufficient complaint by verbal discussions. Finally, WHC contends that OCEP's investigation of the Complaint violated the Administrative Procedure Act (APA). Statement at 2-7.

The criteria for filing a complaint are stated in 708.6 (c):

A complaint need not be in any specific form provided it is signed by the complainant and contains the following: A statement setting forth specifically the nature of the alleged discriminatory act, and the disclosure, . . . a statement that the complainant has not . . . pursued a remedy available under State or other applicable law; and an affirmation that all facts contained in the complaint

are true and correct to the best of the complainant's knowledge and belief. Additionally, the complaint must contain a statement affirming that (1) All attempts at resolution through an internal company grievance procedure have been exhausted; (2) The company grievance procedure is ineffectual . . . or (3) The company has no such procedure.

10 C.F.R. 708.6 (c).

Oglesbee's formal written complaint was filed with DOE/RL on August 24, 1992 and consisted of a document entitled "Review of Ms. Gai Oglesbee's Submitted Issues." It was forwarded to OCEP along with many pages of supplemental documentation provided by Oglesbee. OCEP was provided with additional information, both orally and in writing, throughout the investigation. At this stage of the proceedings, Oglesbee's complaint file consists of a voluminous amount of supplemental documentation, including records of telephone conversations between Oglesbee and OCEP personnel.

We need not analyze whether Oglesbee's complaint specifically met each of the criteria outlined in 708.6, since the decision to accept a complaint is clearly within the discretion of the OCEP Director. In the present case, although Oglesbee's complaint was not perfect, the Director exercised her discretion to accept the complaint while also accepting supplemental documentation to support the complaint.

It is clear from the regulatory history that the remedial purpose underlying Part 708 is to ensure that contractor employees are protected from reprisal for disclosing valuable information. Sandia, supra. Therefore, it is important to construe these regulations liberally in favor of disclosure, and not to hold these employees to the strictest standards of technical pleading. As noted above, there is no evidence in the record to suggest that the OCEP Director abused her discretion in accepting Oglesbee's complaint.

In addition, the purpose of the requirement that a complaint be specific and informative is to avoid unfairness to the contractor. In this case, WHC received adequate notice of the allegations in Oglesbee's complaint. WHC was apprised of Oglesbee's allegations during the investigation, and the alleged retaliatory actions were outlined in a September 29, 1993 letter to WHC. OCEP also sent a letter dated May 28, 1993 to Mr. Thomas M. Anderson, president of WHC, setting forth the WHC actions which Oglesbee alleges were in retaliation for her disclosures. WHC has therefore been afforded a full opportunity to respond to Oglesbee's allegations of reprisal. Also, as evidenced by OCEP's favorable ruling for WHC with regard to each of the complainant's allegations, WHC has certainly not been prejudiced to date by the acceptance of the complaint.

Lastly, WHC asserts in its Statement that the APA was violated by OCEP's investigation of the Complaint, citing 5 U.S.C. 706. Section 706 states, in pertinent part, that "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." However, as stated above, there is no evidence whatsoever in the record that the OCEP Director abused her discretion in accepting Oglesbee's complaint; nor is there evidence that the acceptance of the complaint was arbitrary or capricious. For this reason, I find this argument to be without merit.

III. Conclusion

A motion to dismiss is appropriate only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact or law on a more complete record. See Sandia, 23 DOE at 89,003. Since dismissal is the most severe sanction that we may apply, it should be used sparingly, and only to prevent a miscarriage of justice. In this regard, we have determined that the acceptance of Oglesbee's complaint was a reasonable exercise of discretionary authority under Part 708 by the Director of the Office of Contractor Employee Protection. Accordingly, the Motion to Dismiss filed by WHC will be denied.

It Is Therefore Ordered That:

(1) The Motion to Dismiss filed by Westinghouse Hanford Company on April 5, 1994, is hereby denied.

(2) This is an Interlocutory Order of the Department of Energy.

Thomas O. Mann

Hearing Officer

Office of Hearings and Appeals

Date: